No. 17941

In the

United States Court of Appeals

For the Ninth Circuit

REYNOLDS METALS COMPANY, a corporation, and HENRY W. SHOEMAKER,
Appellants and Cross Appellees,

vs.

JULIUS LAMPERT and EVELYN LAMPERT,
Appellees and Cross Appellants.

Appellees' Reply to Petition for Rehearing

Appeal from the final judgment of the United States District Court for the District of Oregon

THE HONORABLE GUS J. SOLOMON, Judge

KING, MILLER, ANDERSON, NASH & YERKE,
FREDERIC A. YERKE, JR.,
CLIFFORD N. CARLSEN, JR.,
1200 American Bank Building, Portland 5, Oregon,
Attorneys for Appellants and Cross Appellees.

GUSTAV B. MARGRAF,
W. TOBIN LENNON,
Reynolds Metals Building, Richmond 18, Virginia,
Of Counsel for Appellants and Cross Appellees.

KOERNER, YOUNG, McCOLLOCH & DEZENDORF,
HERBERT H. ANDERSON,
GEORGE L. KIRKLIN,
800 Pacific Building, Portland 4, Oregon,
Attorneys for Appellees and Cross Appellants.

INDEX

TABLE OF CASES AND AUTHORITIES

CASES

OTHER AUTHORITIES

Reply to Petition for Rehearing

Pursuant to a request of the Court, appellees submit hi reply to appellants' petition for a rehearing of appellees' cross-appeal on the issue of punitive damages.

ARGUMENT

I

This Court correctly ascertained the law of Oregon pertaining to punitive damages.

1. This Court correctly ascertained the law of Oregon relating to punitive damages. *Fisher v. Carlin*, 219 r159, 346 P2d 641 (1959), emphasizes that malice n bad motive are not the only aggravating circumstances which justify an award of such damages; aton disregard of social obligations is another such umstance. *Hall v. Work*, 223 Or 347, 354 P2d 837, 6 Or 533 (1960) states the same rule.

"The cases consistently hold that punitive damages may be allowed where there is evidence of malice *or willful, wanton disregard of the property rights of plaintiff or other aggravating circumstances*." (Emphasis supplied) *Hall v. Work*, 223 Or 347, 363, 354 P2d 837, 844, 366 P2d 533 (1960).

ellants ignore both *Fisher v. Carlin, supra*, and *Hall Work, supra*.

2. Appellants have not produced a single decio from Oregon or elsewhere denying punitive damge on the ground that a defendant committed a tres as while using his property in an otherwise lawful ma ner. (Appellants cite an unreported decision of a cia court, but the plaintif therein introduced no evidnc to support his claim for punitive damages and didnc press the claim at trial. There was no holding in na case denying punitive damages as a matter of law.

3. Appellants quote language from the opinio i *Perez v. Central National Insurance Co.*, 215 Or 0 332 P2d 1066 (1958), but in a manner which is mi leading for one is left with the impression that the re gon courts will allow punitive damages only in cse whose facts closely resemble the facts in cases whei such damages have been previously allowed. In *Pe* the Court merely refused to expand the list of aggraat ing circumstances previously held to justify puniv damages. A plaintiff must still demonstrate the exst ence of one or more of the circumstances enumerae in *Fisher v. Carlin*, *supra*.

4. The argument appellants base upon the cas o *Cays v. McDaniel*, 204 Or 449, 283 P2d 658 (195 assumes that the opinion of this Court authorizes h recovery of punitive damages in any case involvinga intentional trespass. Appellees have never contend

ad this Court manifestly did not hold, that the mere entional emission of fluorides into the atmosphere ould justify, without more, an award of punitive damaes. This Court held that the record contained *addinal* evidence from which the jury could have found e existence of aggravating circumstances.

II.

This Court's application of Oregon law was correct.

1. The opinion of this Court emphasizes the fact at for a period of years appellants have known that uorides from their plant settle on appellees' property d damage appellees' crops. (See Tr 162-64, 173-74.) ne record, moreover, is replete with additional evinence justifying the Court's decision.

(a) From the testimony of Paul Martin (Tr 9, 10) e jury could have found that appellants failed to imove their fluoride controls because "it is cheaper to ay the claims than it is to control fluorides."

(b) Appellees have had to bring successive actions recover damage occasioned by appellants' repeated espasses for each year since 1947.

(c) From the testimony of Sigmund Schwarz (Tr 45-59) the jury could have found that superior methods fluoride control have been, and are, available to ppellants and if installed would remove practically ll fluorides.

(d) Despite their knowledge of the damaging ef-
fects of fluoride emission, appellants in 1957 nea
doubled the output of fluorides into the air. (Tr 164-6

2. Appellants ask this Court to consider a rec
New Jersey decision (*Berg v. Reaction Motors Div.*,
NJ 396, 181 A2d 487 (1962)) which is clearly dist
guishable on its facts. None of the aggravating circu
stances listed above were present in *Berg*. Defendant
that case had actively cooperated with the plaintiffs
an attempt to develop a program for minimizing
likelihood of property damage, and had substantia
carried out the plan agreed upon.

In the instant case appellants' only attempt to
duce fluoride emission was their installation in 19
of a water scrubbing system. But a substantial portio
of the harm appellees and others have suffered h
occurred since that time, and appellants' use of t
stations does nothing to alleviate the problem. As t
Court pointed out in the unpublished opinion in *Rey-
olds Metals Co. v. Yturbide*, No. 14990 (9th Cir, Ap
24, 1957), the maintenance of testing stations indica
knowledge of a serious toxic condition. And in vie
of appellants' intention to pay claims rather than co
trol fluorides, it may well be inferred that the testi
stations were maintained for purposes connected wi
litigation rather than fluoride control.

It has become evident that compensation alone w
not deter appellants; an award of punitive damages
amply justified. See *Kingsley v. United Railways C*.

60 Or 50, 133 Pac 785 (1913) and Morris, *Punitive Damages in Tort Cases*, 44 Harv L Rev 1173 (1931).

3. The motions for leave to submit briefs *amici curiae* assert that there is no way to prevent the emission of effluents into the atmosphere and that the decision of this Court will render manufacturers potentially liable for punitive damages where some particulate matter escapes, though in harmless quantities. The assertion reveals a careless reading of the opinion in this case and is wholly without support in the record. Punitive damages are in no case recoverable absent proof of actual damage. Movants choose to ignore the opinion and record, and in the guise of *amici curiae*, seek to retry appellants' case in this Court.

Respectfully submitted,
KOERNER, YOUNG McCOLLOCH & DEZENDORF,
HERBERT H. ANDERSON
GEORGE L. KIRKLIN
Attorneys for Appellees

CERTIFICATE

I certify that, in connection with the preparation of this reply, I have examined Rules 18, 19 and 23 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing reply to petition for rehearing is in full compliance with those rules.

HERBERT ANDERSON
Attorney